No. 4083 AT LAW.

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA *ex rel.* THOMAS W. MILLER, Alien Property Custodian of the United States of America,
Plaintiff and Relator in Error,

v.

C. W. CLAUSEN, State Auditor of the State of Washington,
Defendant and Respondent in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF OF DEFENDANT AND RESPONDENT IN ERROR

JOHN H. DUNBAR,
Attorney General of the State of Washington,

M. H. WIGHT,
Assistant Attorney General of the State of Washington,

Attorneys for Defendant and Respondent in Error.

H. C. BRODIE,
GUIE & HALVERSTADT,
Of Counsel.

Office and Postoffice Address: Temple of Justice, Olympia, Washington

FRANK M. LAMBORN, PUBLIC PRINTER

No. 4083 AT LAW.

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA *ex rel.* THOMAS W. MILLER, Alien Property Custodian of the United States of America,
Plaintiff and Relator in Error,

v.

C. W. CLAUSEN, State Auditor of the State of Washington,
Defendant and Respondent in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF OF DEFENDANT AND RESPONDENT IN ERROR

JOHN H. DUNBAR,
Attorney General of the State of Washington,

M. H. WIGHT,
Assistant Attorney General of the State of Washington,

Attorneys for Defendant and Respondent in Error.

H. C. BRODIE,

GUIE & HALVERSTADT,
Of Counsel.

Office and Postoffice Address: Temple of Justice, Olympia, Washington

No. 4083 AT LAW.

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA *ex rel.* THOMAS W. MILLER, Alien Property Custodian of the United States of America,
Plaintiff and Relator in Error,

v.

C. W. CLAUSEN, State Auditor of the State of Washington,
Defendant and Respondent in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF OF DEFENDANT AND RESPONDENT IN ERROR

STATEMENT OF THE CASE.

As stated in plaintiff's brief, this is an action instituted by the Alien Property Custodian to compel the auditor of the State of Washington to issue a warrant on a certain voucher heretofore issued to the Alien Property Custodian by virtue of a decree of the District Court which was affirmed by this court.

ARGUMENT.

It is the position of the defendant (1) That this is an action against the State; (2) That the District Court does not have jurisdiction of an action against the State by virtue of section 233 of the Judicial Code, and that said section is not impliedly repealed by section 17 of the Trading with the Enemy Act; (3) That this action is not ancillary to the action of *Clifford v. Miller,* 288 Fed. 537; and (4) That in drawing the warrant demanded in this case the auditor exercises discretionary power and mandamus will not lie.

I.

This is an Action Against the State.

The Workmen's Compensation Act of the State of Washington was enacted by virtue of the police power, and its constitutionality was sustained on that ground. *State v. Mountain Timber Company,* 243 U. S. 219. The preamble to chapter 74, Laws of 1911, is as follows:

"An act relating to the compensation of injured workmen in our industries, and the compensation to their dependents where such injuries result in death, creating an industrial insurance department, making an appropriation for its administration, providing for the creation and disbursement of funds for the compensation and care of workmen injured in hazardous employment, providing penalties for the non-observance of regulations for the prevention of such injuries and for violation of its provisions, asserting and exercising the police power in such cases, and,

except in certain specified cases, abolishing the doctrine of negligence as a ground for recovery of damages against employers, and depriving the courts of jurisdiction of such controversies, and repealing sections 6594, 6595 and 6596 of Remington and Ballinger's Annotated Codes and Statutes of Washington, relating to employes in factories, mills or workshops where machinery is used, actions for the recovery of damages and prescribing a punishment for the violation thereof."

Section 1, chapter 74, Laws of 1911, being section 6604-1, Rem. 1915 Code, contains a declaration of policy reciting that the common law system governing the remedy of workmen against employers for injuries received in hazardous work, is inconsistent with modern industrial conditions and in practice proves to be economically unwise and unfair. That the remedy of the workman has been uncertain, slow and inadequate, that injuries in such employments, formerly occasional, have become frequent and inevitable, and that the welfare of the State of Washington depends upon its industries, and even more upon the welfare of its wage workers, "the State of Washington therefore exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and

civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Section 2 provides that while there is hazard in all employment, certain employments have come to be and are recognized as being inherently constantly dangerous. Such employments are designated as "extrahazardous," and those included within the act are enumerated in section 2.

The third section contains a definition of terms not here important.

Section 4 contains a schedule of contribution classifying the industries under the act in the degree of their award, and specifying the percentage that such industries shall pay as premiums on their pay-rolls, into a fund designated as the accident fund.

Section 5 contains a schedule of the compensation to be awarded out of the accident fund, which is the fund composed of the premiums paid in by virtue of section 4 to each injured workman or to his family or dependents, in case of his death, and declares that except as in the act otherwise provided, such payment shall be in lieu of any and all rights of action against any person whatsoever.

Section 8 provides that in case any employer shall default in any payment to the accident fund, the sum due shall be collected by action at law in the name of the state as plaintiff, and such right of action

shall be in addition to any other right of action or remedy.

Section 10 provides that no money paid or payable under this act out of the accident fund shall, prior to issuance and delivery of the warrant therefor, be capable of being assigned, charged, nor even be taken in execution or attached or garnished, nor shall the same pass to any other person by operation of law.

Section 12 provides for the filing of claims by the injured workman or his dependents or beneficiaries in case of his death, and provides that no application shall be valid unless filed within one year after the date upon which the injury occurred or the right thereto accrued.

Section 20 provides that any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interests under this act, may have the same reviewed by a proceeding for that purpose in the nature of an appeal initiated in the superior court of the county of his residence.

Section 21 creates a department to administer the act.

Section 24 provides that the department shall have power to promulgate certain rules for the purpose of administering the act.

Section 26 provides that disbursements out of the funds shall be made only upon warrants drawn by the state auditor upon vouchers therefor trans-

mitted to him by the department and audited by him, and that the state treasurer shall pay every warrant out of the fund upon which it is drawn. It also provides that the state treasurer shall be liable upon his official bond for the safe custody of the moneys and securities of the accident fund, "but all the provisions of an act approved February 21, 1907, entitled 'An act to provide for state depositories and to regulate the deposits of state moneys therein,' shall be applied to said moneys and the handling thereof by the state treasurer."

Section 29 appropriates the sum of $1,500,000.00 out of the general fund for the administrative expenses of the department in administering the act.

Section 31 provides that in case the act shall be hereafter repealed, all moneys which are in the accident fund at the time of the repeal shall be subject to such disposition as may be approved by the legislature.

It will be noted that the defendant, C. W. Clausen, is sued in his official capacity as auditor of the State of Washington and not in his individual capacity. In this action it is attempted to compel him to issue a warrant on a certain voucher heretofore issued to the Alien Property Custodian by the Department of Labor and Industries of the State of Washington in conformity with the judgment in *Clifford v. Miller, supra.* As we view it, the test of whether or not an action is one against the state is: Who is affected by the judgment? In the instant case it is apparent

that the defendant in his individual capacity as a citizen would be in no wise affected by any judgment that might be entered in this case, the only effect being that the Alien Property Custodian would have in his possession a warrant drawn against the accident fund of the State of Washington in the custody and control of the State Treasurer. In the case of *State ex rel. Pierce County v. Superior Court,* 86 Wash. 685, it appeared that a taxpayer of Pierce County began an action in the Superior Court of Thurston County, making parties defendant, among others, C. W. Clausen, as State Auditor, and W. R. Roy, as State Highway Commissioner, praying that a certain contract entered into between the county and the paving company be adjudged void, that work be stopped, and that the State Highway Commissioner be enjoined from certifying for payment to the State Auditor any sum of money earned on the contract. This action was then instituted for the purpose of procuring a writ of prohibition against the superior judge of Thurston County seeking to prohibit him from proceeding further in the action. In holding that this second action was, in fact, an action against the state, the court, on page 688, said:

"The suit in question, while in form a suit against certain of its executive officers in their representative capacities, is in essence and effect a suit against the state. The suit is instituted to restrain these officers, the one from certifying that certain sums payable out of the state treasury has been earned in the performance of a contract in which the state has an interest, and the other from drawing warrants on the

state treasury for the payment of such certificates, if any are so presented to him. The funds involved are the funds of the state. The officers sought to be enjoined have no interest in the funds. They are merely the agents of the state by and through whom the state acts. They are not charged with acting in excess of the authority conferred upon them by law, nor is it charged that the law under which they are acting is for any reason void. The charge is, on the contrary, that a contract in which the state has an interest, and which, if valid, makes a charge upon the state's funds, is void because of fraud in its inception. Clearly we think such a suit, even though brought against its officer, must in effect be a suit against the state."

The language there used is applicable to the case at bar, as the funds here involved are funds of the state. The defendant has no interest whatever in the accident fund, and merely acts as an agent of the state in the manner prescribed by state law, nor is it charged that he is acting in excess of his authority or that the law under which he is acting is void. As we will attempt to show in the fourth subdivision of this brief, in passing on this voucher also the auditor has discretionary powers in issuing a warrant from state funds.

The case of *Oregon v. Hitchcock,* 202 U. S. 60, was an action instituted by the State of Oregon against Ethan E. Hitchcock, Secretary of the Interior, and William A. Richards, Commissioner of the General Land Office, to restrain them from allotting or patenting to any Indians or other persons certain lands in the Klamath Indian Reservation,

and praying that the title to such lands be decreed to be in the State of Oregon. In holding that this was, in fact, a suit against the United States, the court, on page 69, said:

"The question of jurisdiction in a case very similar to this was fully considered in *Minnesota v. Hitchcock, supra.* There as here, a state was plaintiff, and the suit was brought against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections 16 and 36 in what was known as the 'Red Lake Indian Reservation.' This suit is brought by a state against the same officers, to restrain them from allotting and patenting in severalty swamp lands within the Klamath Indian Reservation. In that case we said (p. 387):

" 'Now the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the state. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.' "

So, in the case at bar, the defendant has no interest whatever in the outcome of this litigation, nor

will it in any manner affect his interests. By the judgment prayed for in this case defendant would be ordered to deliver to the plaintiff a certain warrant. This warrant is drawn against a public fund in the State Treasury. It consists of involuntary premiums exacted by the state by virtue of its police power from certain employers, and partakes of the nature of a tax. It is thus readily seen that it is at least a material step in lessening a state fund in case the plaintiff is successful in this litigation. This would, of necessity, compel all employers of the State of Washington to pay a higher premium, and thus affect all the people of the state, as can readily be seen by referring to the preamble to the Workmen's Compensation Act of the State of Washington. (Sec. 7673, Rem. Comp. Stat.)

In construing the South Carolina legislation controlling liquor in the case of *Carolina Glass Co. v. So. Carolina,* 240 U. S. 307 (314), the court said:

"Under the provisions of the Constitution (Art. VIII, Sec. 11) and statutes (25 Stat. 463) the county dispensaries are conducted 'under the authority and in the name of the state.' Therefore, the officers in charge of them are agents of the state and the funds arising from the sale of liquors through them are the funds of the state, and the debts due for goods sold to them are the debts of the state. In exercising the powers conferred upon it by the legislature, the Dispensary Commission is also the agent and representative of the state, 'subject to no interference, except that of the General Assembly itself,' and a suit brought against it is, in effect, a suit against the

state. *State v. Dispensary Commission,* 79 S. Car. 316, 329, 60 S. E. Rep. 928."

In the case of *Lovett v. Lankford,* 145 Pac. 767, it appeared that the plaintiff deposited some moneys with a certain bank which was a member of the state bank guaranty fund, which bank subsequently failed. An action was then instituted against the State Bank Commissioner to recover from the guaranty fund the amount of the deposit. In holding that this was an action against the state, the court, on page 769, said:

"It cannot be questioned that a judgment in this case in favor of plaintiffs in error would directly affect the state and would, in effect, be a judgment against the state and would require the subjection of state funds to satisfy said judgment."

The state guaranty fund does not partake of the nature of a state fund as much as the accident fund here involved. The guaranty fund is composed of moneys involuntarily put up by member banks for the purpose of taking care of depositor members that have failed, whereas the accident fund partakes of the nature of a tax and is involuntarily extracted from certain employers by the state by virtue of its police power.

A case similar to this was taken to the Supreme Court of the United States, being the case of *Lankford v. Platte Iron Works,* 59 Law Ed., page 316, wherein the court said:

"The title of such depositors' guaranty fund vests in the state, just as much so as the common school lands or the proceeds of the sale of the same * * *.

"From this decision it appears that the law intended to give to the state as definite a title to the depositors' guaranty fund as to the common school fund * * *. In both cases there were ultimate beneficiaries—in the pending case, the bank depositors; in the other case, the creditors of the dispensary. And the purpose of the law—or, if you will, the command of the law—in each case was or is the satisfaction of the claims of those beneficiaries. The fund, having this ultimate destination, does not take its administration from the officers of the state, or subject them to judicial control. We cannot assume that it will not be faithfully managed and applied."

Again, in the case of *In Re State of New York,* 256 U. S. 490, a libel was filed against three boats for damage caused by a collision, and damage was also asked against Ed. S. Walsh, Superintendent of Public Works of the State of New York, who, it was alleged, was operating said boats. In holding this a suit against the state, the court said (p. 590):

"As to what is to be deemed a suit against a state, the early suggestion that the inhibition might be confined to those in which the state was a party to the record (*Osborn v. U. S. Bank,* 9 Wheat. 738, 846, 850, 857, 6 L. Ed. 204) has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record. * * *

"Thus examined, the decided cases have fallen into two principal classes, mentioned in *Pennoyer v. McConnaughy,* 140 U. S. 1, 10, 11 Sup. Ct. 608 (35 L. Ed. 363):

" 'The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though

not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts (citing cases). The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit * * * is not, within the meaning of the Eleventh Amendment, an action against the state.'

"The first class, in just reason, is not confined to cases where the suit will operate so as to compel the state specifically to perform its contracts, but extends to such as will require it to make pecuniary satisfaction for any liability. *Smith v. Reeves*, 178 U. S. 436, 439, 20 Sup. Ct. 919, 44 L. Ed. 1140."

Testing the present action by the rule announced in this case, it is apparent that this is an action against the state. This is an action brought against an officer of the state as representing the state's action and liability. Of this statement we believe there can be no dispute. This is not an action brought against the defendant claiming to act as an officer of the state and under color of an unconstitutional statute, nor has any act been committed of wrong and injury to the rights of third parties. There is a certain line of cases relied on by counsel for plaintiff to the effect that where an officer, acting under an unconstitutional statute or by no authority of law, commits an act injuring others, that he may not hide behind the cloak of immunity of suit against the state. Obviously, that question is not here involved. This is not an action for damages which arose by

reason of an unlawful act on the part of the defendant, but is an action to compel him to issue a warrant, when, under the statutes of this state, he has discretionary powers in issuing such a warrant. In the case of *Johnson v. Lankford,* 245 U. S. 541, relied upon by plaintiff, it appeared that this was an action instituted against one Lankford, the bank commissioner, for damages against him for certain unlawful acts which he had performed. In holding that this was not an action against the state, the court said:

"There is certainly no assertion of state action or liability upon the part of the state, and no relief is prayed against it. The charges are all against Lankford. The relief sought is against him because of his wilful or negligent disregard of the laws of the state, and it is because of this his surety is charged with liability, it having guaranteed his fidelity.

* * * * * * * *

"The case is not like *Lankford v. Platte Iron Works Co.,* 235 U. S. 461. There the effort was to compel the payment of a claim (certificates of deposit issued by a bank) out of the fund to which the state had a title and which it administered through its officers. Any demand upon it was a demand upon the state and a suit to enforce the demand was a suit against the state, necessarily precluded by the purpose of the law. The case at bar is not of such character. Its basis is Lankford's dereliction of duty, a duty enjoined by the laws of the state, and the dereliction is charged to have been continuous, overlooking violations of the requirements of law by the bank officials by which it was brought to insolvency, knowing of the depletion of its assets, knowing of the reduction of its reserves, and not requiring their repair. A further dereliction is charged after Lankford took possession and such arbitrary conduct and

preferences that plaintiff's claim was subordinated to other claims of like character."

The theory upon which this court held that the case of *Clifford v. Miller, supra,* was not an action against the state, was that the state officials had certain property in their possession which they were unlawfully holding from the Alien Property Custodian by virtue of the decision of the United States Supreme Court in the case of *Central Union Trust Co. v. Garvan,* 254 U. S. 554, as evidenced by the following language in the opinion of the court in that case:

"No relief whatever is sought against the state and no attempt is made to control the discretion of its executive officers or to administer funds in the public treasury. In this respect the case differs widely from *Lankford v. Platte Iron Works,* 235 U. S. 461, 35 Sup. Ct. 173, 59 L. Ed. 316, and kindred cases cited by the appellants. In the Lankford case the court awarded a money judgment to the plaintiff and decreed that it was entitled to have the same paid out of the depositors' guaranty fund created under and by virtue of the laws of the state of Oklahoma. Had the appellee here sought the same measure of relief, there would be some analogy between the two cases. But, as already stated, neither the state nor its funds are affected by the decree in the remotest way, and no attempt is made to control the judgment or discretion of state officers." (*Clifford v. Miller,* 288 Fed. 537, 540.)

It was apparently the theory of this court that the reason that the state funds were not affected by the decree in the case of *Clifford v. Miller* was that in the possessory action instituted by the Alien Prop-

erty Custodian he merely was entitled to naked possession of the property so that it might be forthcoming in event it subsequently was shown that the money was due an alien. The present action is not a possessory one for the reason that the auditor has nothing in his possession to turn over to the Alien Property Custodian. On the contrary, he is asked to perform an official act and produce and bring into existence an evidence of indebtedness of the State of Washington. For this reason the case of *Clifford v. Miller, supra,* is squarely in point in holding that this is an action against the state, for the reason that the issuance of a warrant not yet in existence is certainly a material step in lessening and affecting a state fund, and for the further reason that it is an attempt to control the discretion of the executive officers of the state in administering its funds. Certainly the issuance of a warrant is at least a material step in administering the funds of this or any other state. From a careful examination of the cases on this question we believe that this is the first attempt in the history of American jurisprudence of the courts of the United States to attempt to control the discretion of the executive officers of a state in administering its funds.

II.

Section 17 of the Trading With the Enemy Act Does Not Repeal Section 233 of the Judicial Code.

(a) The Trading with the Enemy Act does not apply to a state.

The Trading with the Enemy Act was enacted as a war measure for the purpose of restraining persons owing money to an alien enemy from turning such moneys over to an alien enemy, and thus give aid and comfort to a country and its inhabitants waging war against this country. In determining the intent of Congress in passing this act, it is submitted that Congress had no apprehension that one of the component states of this Union would give financial aid to alien enemies, and this is strengthened by the fact that in defining the word "person," the term "state" is not used, but rather the vague term "body politic," which counsel for the plaintiff strenuously contends includes a state. The term "person," in section 2, subdivision (c) (Fed. Stat. Ann., 1918 Supp., p. 848) of the Trading with the Enemy Act, is defined as follows:

> "The word 'person,' as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic."

Counsel devotes considerable space in his brief in an effort to show that the term "body politic" in that section must be intended to include a state.

Before proceeding with our argument on this question, we desire to call the court's attention to the fact that section 233 of the Judicial Code provides that the United States Supreme Court shall have exclusive jurisdiction of an action against a state, whereas section 17 of the Trading with the Enemy Act provides, in substance, that the District Courts of the United States shall have jurisdiction to make and enter all such rules as to notice and otherwise and to issue such process as may be necessary and proper to enforce the provisions of this act. While a number of courts have had occasion to construe the term "body politic," in connection with particular statutes, it has never been construed in any court in such a manner as to hold that it gives an inferior Federal Court jurisdiction over the state in its sovereign capacity in an action brought in such inferior court against the state. The phrase "body politic" has a very wide and all-embrasive meaning when used in a general sense, and the courts have construed it to include every imaginable political corporate entity from an institution of learning—*School Board v. Meredith,* 71 So. 209—to the United States of America in the citation in counsel's brief on page 16. Incidentally, we might say that Chief Justice Marshall's definition of the United States as a body politic and corporate was in a general sense, and not for the purpose of construing a statute in which the term "body politic" had been used.

If it were not for other constitutional and statutory provisions, the term is unquestionably broad enough to include the state, but inasmuch as it is a general term which includes all possible bodies politic and corporate within the United States, and would therefore include drainage districts, irrigation districts, towns, cities and numerous other political subdivisions, as to all of which there is no constitutional or statutory inhibitions to prevent jurisdiction of the court attaching while in the case of a state there are such constitutional and statutory prohibitions, the intention of Congress to repeal such provisions by the use of a term of such general and indeterminate significance, and bring a sovereign state within the jurisdiction of the inferior Federal Courts must be plainly apparent. If section 233 of the Judicial Code, which gives the United States Supreme Court exclusive jurisdiction of an action against the state is repealed by the Trading with the Enemy Act, it is repealed by implication and by virtue of a construction to the effect that a state is, in fact, a body politic. It is submitted that if such a repeal were intended or had actually taken place, that Congress would have used the word "state" and not the loose and vague term "body politic."

(b) Intention to repeal section 233, Judicial Code, must be plainly apparent in view of special dignity accorded state by Federal Courts.

The first Congress in the Act of September 24,

1789, chapter 20, section 13, 1 Stat. at L., 80, provided as follows:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states or aliens, in which latter cases it shall have original but not exclusive jurisdiction."

This provision is now incorporated in section 233 of the Judicial Code in the following language:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party."

This provision for exclusive jurisdiction of the Supreme Court of the United States in actions against the state has remained the supreme law of the land for 134 years.

It has been held under this section that a state, if it sees fit, may submit to the jurisdiction of the inferior courts, and the state, as plaintiff, may therefore select such court as it may see fit, but there has never been a case, so far as we have been able to discover, where any court has held that the state can

be sued in its sovereign capacity, without its consent in any court except the United States Supreme Court. The courts of the United States have always been scrupulously careful in their recognition of the respect due the dignity of a sovereign state, and it was deemed incompatible with such dignity to compel a sovereign state to submit unwillingly to the jurisdiction of any court of less solemn power than the Supreme Court of the land.

"That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a state, is clear; for by the Revised Statutes it is declared—as was done by the Judiciary Act of 1789—that 'the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a State and its citizens, or between a State and citizens of other states or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction.' Rev. Stat., sec. 687; Act of September 24, 1789, c. 20, sec. 13; 1 Stat. 80. *Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation.* Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?" *U. S. v. Texas,* 143 U. S. 621, 36 L. ed. 285. (Italics ours.)

This same thought is also embodied in the case of *Ames v. Kansas,* 111 U. S. 449, 464, 28 L. ed. 482, in the following language:

"It thus appears that the first Congress, in which were many who had been leading and influential

members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the States and with the objections urged against it, did not understand that the original jurdisdiction vested in the Supreme Court was necessarily exclusive. That jurisdiction included all cases affecting ambassadors, other public ministers and consuls, and those in which a State was a party. The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made; but to compel a State to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject matter of his action, would be, in many cases, to convert what was intended as a favor into a burden.

* * * * * * * * *

"With respect to states, it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a state was a party, except between a state and its citizens, and except also, between a state and citizens of other states or aliens; in which latter case its jurisdiction should be original but not exclusive. Thus the original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a state and citizens of other states or aliens. No jurisdiction was given in such cases to any other court of the United States, *and the practical effect of the enactment was, therefore, to give the Supreme Court exclusive original jurisdiction in suits against a state begun without its consent,* and to allow the state to sue for itself in any tribunal that could entertain its case. In this way *States,* ambassadors and public

ministers *were protected from the compulsory process of any court other than one suited to their high positions,* but were left free to seek redress for their own grievances in any court that had the requisite jurisdiction. No limits wer set on their powers of choice in this particular. This, of course, did not prevent a state from allowing itself to be sued in its own courts or elsewhere in any way or to any extent it chose." (Italics ours.)

The recognition accorded state sovereignty is to be found in many different lines of decisions of the Supreme Court of the United States. One familiar example is the requirement in rate cases that state remedies must be first exhausted before recourse may be had to the Federal Courts, under the rule of comity and convenience laid down in the case of *Prentis v. Atlantic Coast Line,* 211 U. S. 210, and followed in numerous later cases.

It is evident that a statute relative to the exclusive jurisdiction of the Supreme Court of the United States which has been observed for one hundred and thirty-four years is not to be entirely set aside or disregarded, nor can the intention be imputed to Congress to repeal such a provision in the Trading with the Enemy Act unless the intention clearly appears. As set forth above, the only possible ground to base such a supposition upon is that a state is to be included among the bodies politic referred to in the Trading with the Enemy Act.

(c) Repeals by implication not favored.

Section 17 of the Trading with the Enemy Act reads as follows:

"That the District Courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled 'An act to codify, revise and amend the laws relating to the judiciary'."

The Trading with the Enemy Act is an act complete within itself and contains no direct repeal of any previous legislation, and if there be a repeal of section 233 of the Judicial Code, it must be by implication. It is a rule observed, we believe, by all courts that repeals by implication are not favored, and if two acts apparently in conflict may be reconciled, such reconciliation will be effected rather than to hold that one act repeals the other. In the present case reconciliation is very easy. The term "body politic" being of such general significance, can be easily applied to all bodies politic except the state, and by reason of the long standing law upon the subject of jurisdiction over the state, it can be properly concluded that Congress did not intend to confer jurisdiction over the state upon the District Court. We do not dispute the power of Congress to confer such jurisdiction under its war powers, but contend

that even under a war act the intention to overthrow a provision of such importance and one so long recognized and observed by our courts, must be plainly apparent and not inferred from general language. The rule relative to repeals by implication is well stated in Lewis' Sutherland on Statutory Construction, Vol. 1, page 247, as follows:

"When some office or function can, by fair construction, be assigned to both acts, and they confer different powers to be exercised for different purposes, both must stand, though they were designed to operate upon the same general subject * * *. The earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to each other, or when in the latter statute some express notice is taken of the former plainly indicating an intention to repeal it, and where two acts are seemingly repugnant they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication."

The same rule is given in every text book on interpretation of statutes and innumerable cases cited in support thereof. We will not burden this court with citations of such a familiar rule other than to call their attention to the case of *United States v. Barnes,* 222 U. S. 513, 520, 56 L. ed. 291, 293, where the court says:

"Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where

there is subsequent legislation upon such a subject, it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears. Thus, in *Wood v. United States,* 16 Pet. 342, 363, 10 L. ed. 987, 995, where a question arose as to what effect should be given a general provision of an early customs law in view of a later enactment upon that subject, it was said: 'And it may be added that, in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numerous to guard against frauds by importers, it would be a strong ground to assert that the main provisions of any such laws sedulously introduced to meet the case of a palpable fraud should be deemed repealed, merely because in subsequent laws other powers and authorities are given to the customhouse officers, and other modes of proceeding are allowed to be had by them before the goods have passed from their custody, in order to ascertain whether there has been any fraud attempted upon the government. The more natural, if not the necessary, inference in all such cases is, that the legislature intend the new laws to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each. There certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated, and were designated to abrogate, the former.' ''

The provisions regarding the jurisdiction and proceedings of the federal courts have been for many years embodied in a judicial code, and the foregoing statement of the court is quite pertinent when any contention is made that a provision of the judicial code relative to jurisdiction of the Supreme Court

of the United States has been changed by implication in any statute.

In view of the fact that section 233 of the Judicial Code expressly states that the Supreme Court of the United States shall have exclusive jurisdiction in actions against the state, and that the Trading with the Enemy Act only provides that the District Courts shall have jurisdiction of actions instituted by the Alien Property Custodian against persons, including a body politic, and does not state that the District Courts shall have jurisdiction of actions against a state, it is submitted that there has been no repeal by implication, which repeals are not favored in law. Nor is there such a direct conflict between the two statutes that one must fail if both be given effect.

Section 2, Article III of the Constitution of the United States, reads, in part, as follows:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make. * * * "

It will thus be noted that the Constitution states that where a state is a party, the Supreme Court of the United States shall have original jurisdiction, whereas, section 233 of the Judicial Code, states that in civil actions in which a state is a party, the Supreme Court shall have exclusive jurisdiction. In the

earlier cases some claim was made that original jurisdiction as used in the Constitution amounted, in fact, to exclusive jurisdiction, but this contention was finally refuted by the courts in cases in which a state was the plaintiff. Great reliance is placed by counsel for the plaintiff on some of the cases holding to this effect.

The case of *Cohens v. Virginia,* 6 Wheat. 264, is in no way applicable, as that was the first case which held that where the state was a plaintiff, a writ of error would lie to the Supreme Court of the United States from a decision of the highest state tribunal. In so holding the court said:

"The Constitution declares that in cases where a state is a party, the Supreme Court shall have original jurisdiction, but does not say that its appellate jurisdiction shall not be exercised in cases where from their nature appellate jurisdiction is given whether a state be or be not a party. It may be conceded that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there, but where from its nature it cannot originate in that court these words ought not to be so construed as to require it."

In that case the state was a party plaintiff and the constitutional provision alone was considered which stated that the Supreme Court had original jurisdiction, but that in a proper case where the state was a plaintiff it might also exercise appellate jurisdiction. In the case of *Bors v. Preston,* 111 U. S. 252, it appeared that one Preston sued Bors, who was a consul for the kingdoms of Norway and Sweden,

in the Circuit Court of the United States. The question was raised as to the jurisdiction of this court. The constitutional provision above quoted states that the Supreme Court of the United States shall have original jurisdiction in actions in which a consul is a party. Section 233 of the Judicial Code also provides that the United States Supreme Court shall have original, but not exclusive, jurisdiction of actions in which a consul was a party. It was there held that although the Constitution invested the Supreme Court with original jurisdiction in cases affecting consuls, it was competent for Congress to confer concurrent jurisdiction in those cases upon such inferior courts as might by law be established. That case is obviously not in point by reason of the fact that Congress has never enacted any legislation stating that the Supreme Court of the United States shall have exclusive jurisdiction in actions where a consul is a party, as they have done in section 233 of the Judicial Code, in cases where a state is a party.

Neither is the case of *Ames v. Kansas*, 111 U. S. 449, in point, as that also was an action in which a state was not a defendant, but a party plaintiff. In holding that there was a vital distinction in cases where the state was a defendant, the court said:

"No jurisdiction was given in such cases to any other court of the United States, and the practical effect of the enactment was therefore to give the Supreme Court exclusive original jurisdiction in suits against the state begun without its consent, and to

allow the state to sue for itself in any tribunal that could entertain its case."

III.

This Action is Not Ancillary to the Case of Miller v. Clifford, 288 Fed. 537.

In support of a contrary conclusion, counsel for plaintiff cites one case, *Gunter v. Atlantic Coast Line Railway Co.,* 200 U. S. 273, 50 L. Ed. 478. The proper rule governing this proceeding, however, is the following:

"Ancillary nature of proceeding. Jurisdiction will not be entertained of suits or proceedings which are not properly ancillary to the original one, unless they are otherwise within the original jurisdiction of the court, but in order that a federal court may have jurisdiction of a suit or other proceeding as dependent, a dependent cause of action is indispensable. * * * After the determination of the original cause, jurisdiction will not be extended to other questions and issues raised by a supplemental bill filed after such determination." 25 C. J. 698. *Pell v. McCabe,* 250 U. S. 573, 63 L. ed. 1147; *Stillman v. Combe,* 197 U. S. 436, 49 L. ed. 822; *H. C. Cook Co. v. Beecher,* 217 U. S. 497, 54 L. ed. 855; *Raphael v. Trask,* 194 U. S. 272, 48 L. ed. 973; *Christmas v. Russell's Executors,* 14 Wall. 69, 20 L. ed. 762; *G. & C. Merriam Co. v. Saalfield,* 241 U. S. 22; 60 L. ed. 868; *Supreme Tribe of Ben Hur v. Cobble,* 264 Fed. 247; *Montgomery v. McDermott,* 103 Fed. 801; *Woerheide v. H. W. Johns-Manville Co.,* 199 Fed. 535; *Central Trust Co. v. Chicago, R. I. & P. Railway Co.,* 224 Fed. 706; *Anglo-Florida Phosphate Co.*

v. McKibbon, 65 Fed. 529; *Winter v. Swinburne,* 8 Fed. 49.

We believe that this case falls clearly within the foregoing rule and citations and that this is not an action ancillary to the former case of *Clifford v. Miller, supra.* A comparison of the subject matter involved in that suit, the relief sought and the defendant therein, with the subject matter, relief and defendant in this action will show clearly that the two proceedings are entirely separate and distinct and that this action is an original action.

The case of *Miller v. Clifford,* as it was entitled in the district court was a suit in equity for the sole purpose of obtaining possession of certain warrants and compelling the issuance of certain vouchers and to obtain possession of such vouchers when issued. It was directed against the superintendent of the Department of Labor and Industries of the state of Washington and the Supervisor of Industrial Insurance of the said department and state. As expressly indicated in the opinion in the case of *Clifford v. Miller, supra,* no relief was sought against the state and no attempt made to administer funds in the public treasury. After the final decree was entered in that suit the vouchers involved therein were issued by the Department of Labor and Industries and such vouchers and warrants were delivered to the Alien Property Custodian. Upon the delivery of these documents full relief sought by that suit had been obtained and the matter was finally determined.

No further action was required thereunder by either the Alien Property Custodian or the defendant in that suit. That suit did not involve the validity of such vouchers or warrants, but the sole subject matter of the litigation was the possession of these papers.

The present proceeding is an action at law in the form of mandamus to compel the State Auditor to draw a warrant on the public treasury of the state of Washington. The defendant in this action is the State Auditor of the state of Washington. He was not a party to the former suit and had no opportunity to contest the legality and validity of the vouchers involved in that suit. We think that after an examination of the foregoing cases and a comparison of the equity suit of *Clifford v. Miller* and this law action of *Miller v. Clausen,* the conclusion cannot be escaped that the present action is not ancillary to the former, but must be considered an independent original proceeding in the district court.

We do not think that anything can be found in the case of *Gunter v. Atlantic Coast Line, supra,* which is contrary to the rule above set forth, while there is much in that case, we think, adverse to counsel's contention. The *Gunter* case was the outgrowth of the earlier case of *Humphrey v. Pegues,* 16 Wall. 244, 21 L. ed. 326, decided by the Supreme Court of the United States in 1873. In the *Pegues* case a permanent injunction was granted to restrain the county treasurers of certain counties in South Caro-

lina from assessing and collecting taxes from certain railway companies. An examination of that case will show that no question of jurisdiction was raised, nor any question that the suit was against the state of South Carolina. The injunction thus granted was observed and no taxes were attempted to be collected from the railway companies for twenty-five years. Then the state of South Carolina, by legislative action, attempted to authorize such taxation and the county officials endeavored to collect from the Atlantic Coast Line Railway Company, the successor in interest of the companies involved in the *Pegues* case, and the railway company took steps to prevent the assessment and collection of such taxes. Although this proceeding was more than twenty-five years after the *Pegues* case, we call attention to the following statement in the *Gunter* case, 200 U. S., page 281, 50 L. ed., 483.

"The petition which initiated the proceeding was filed as ancillary to the original Pegues case, and was entitled and numbered as that cause."

Counsel in this case has not followed such practice, but has given this action a new title and it has been docketed under a new number. Furthermore, counsel has not in this action set forth the decree in the former action, but has only alleged in his petition certain erroneous conclusions of law as to the effect of the decree in the former suit.

Although in the *Pegues* case the jurisdictional question was not raised, the supreme court in the

Gunter case by an elaborate train of reasoning shows that in the *Pegues* case the state of South Carolina was the real party in interest and waived any objections that might have been raised to the jurisdiction, and jurisdiction having attached in that original proceeding would be retained in the ancillary proceeding, although that also was against the state as the real party in interest. The court says on page 292, 200 U. S. and page 487, 50 L. ed.:

"None of the prohibitions, therefore, of the amendment or of the statute relate to the power of a Federal Court to administer relief in causes where jurisdiction as to a state and its officers has been acquired as a result of the voluntary action of the state in submitting its rights to judicial determination. To confound the two classes of cases is but to overlook the distinction which exists between the power of a court to deal with a subject over which it has jurisdiction, and its want of authority to entertain a controversy as to which jurisdiction is not possessed. From this it follows that, as in the *Pegues* case, the court had acquired jurisdiction, with the assent of the state of South Carolina, to determine as to it the controversy presented in that case, the right of the court to administer relief—to make its decree effective—cannot be measured by constitutional or statutory provisions relating to original proceedings where jurisdiction over the controversy did not obtain." (Italics ours)

In the case of *Clifford v. Miller* the state never consented to the jurisdiction, but was overruled, the circuit court holding that the state was not a party in that suit. The state does not consent to jurisdiction in this case, and for the reasons indicated, holds

that this is an original action and not an ancillary proceeding and the situation is therefore entirely different from the situation in the *Gunter* case.

As stated in the case of *Clifford v. Miller, supra*:

"But as already stated, neither the state nor its funds are affected by the decree in the remotest way, and no attempt is made to control the judgment or discretion of state officers."

The decree in that case simply ordered the defendants to turn over to the Alien Property Custodian certain warrants in his possession and to issue a voucher for other warrants. That decree was completely complied with, which brought about a final determination of the action in that case, so that the present action must be and is an independent one. Furthermore, the parties to the two actions are not the same, as in the case of *Clifford v. Miller,* the Circuit Court of Appeals held that the state was not a party defendant but that the officers were defendants and were wrongfully withholding possession of property in their possession to which the plaintiff was entitled. The State of Washington, in the present action, is the real defendant, and the State Auditor the nominal defendant, so that even the parties to the action are not the same. Furthermore, in the case of *Gunter v. Atlantic Coast Line Railway Co., supra,* the real issue was not whether the second action was ancillary to the first, but whether the injunction issued in the first action was *res adjudicata* as to the issues involved in the second action.

IV.

The State Auditor Has Discretion in Issuing Warrants and Mandamus Does Not Lie to Control Such Discretion.

Section 7705, Rem. Comp. Stat., which is a part of the workmen's compensation act, provides in part as follows:

"Disbursement out of the funds shall be made only upon warrants drawn by the state auditor upon vouchers therefor transmitted to him by the department and *audited by him.*"

The term "audit" has been frequently construed by the courts. Typical definitions are:

" 'To "audit" is to hear, to examine an account, and in its broader sense it includes its adjustment or allowance, disallowance or rejection.' *People ex rel. McCabe v. Matthies,* 72 N. E. 103, 104, 179 N. Y. 242 (quoting and adopting definition in *People ex rel. Myers v. Barnes,* 114 N. Y. 317, 323, 2 N. E. 609, 610; *People v. Board of Apportionment and Audit,* 52 N. Y. 224, 227). For the same or substantially similar definitions, see *People ex rel. Andrus v. Board of Sup'rs of Saratoga County,* 94 N. Y. Supp. 1012, 1013, 106 App. Div. 381; *People ex rel. Ramsdale v. Board of Sup'rs of Orleans County,* 38 N. Y. Supp. 890, 16 Misc. Rep. 213, 214."

"To 'audit' is to hear and examine an account and includes its adjustment, allowance or disallowance at some definite sum. A report of auditors that they have allowed a certain claim at a sum not to exceed a specified amount is not sufficient to constitute an 'audit'. *Stemmler v. Mayor, etc., of City of New York,* 72 N. E. 581, 583, 179 N. Y. 473."

"The meaning of the phrase 'to audit', when applied to claims against towns, cities or counties, means to hear, to examine an account, and, in its

broader sense, includes its adjustment or allowance, disallowance, or rejection; and the verb, 'audit', as so used, means simply to examine, to adjust, and clearly implies the exercise of judicial discretion. Where a city officer presents his accounts to a board having power to audit them, and fails to charge himself with moneys received, of which failure the board has no knowledge, its audit of his account is not binding upon the city in favor of such officer or his sureties as to the amounts not accounted for by him. *City of Syracuse v. Roscoe,* 123 N. Y. Supp. 403, 408, 66 Misc. Rep. 317."

Even though there were no other statutory duty imposed upon the auditor, it is evident that under his instructions to audit vouchers of the Department of Labor and Industries prior to drawing a warrant in payment thereof, he not only may but should exercise his discretion as to the legality and sufficiency of the voucher.

But the statutes of the state of Washington have made it his specific duty to exercise such discretion, as will be found by an examination of the following sections of Rem. Comp. Stat.:

Section 11001: "It shall be the duty of the auditor,—

"1. To audit, adjust, and settle all claims against the state, payable out of the treasury, except only such claims as may be expressly required by law to be audited and settled by other officers or persons; * * *

"16. In his discretion, to require any person presenting an account for settlement to be sworn before him, and to answer, orally or in writing, as to any facts relating to it."

Section 11007: "All persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled, and allowed, within two years after such claim shall have accrued, and not afterwards. And in all actions brought in behalf of the state, no debt or claim shall be allowed against the state as a set-off, but such as has been exhibited to the auditor, and by him allowed or disallowed, except only in cases where it shall be proved to the satisfaction of the court that the defendant at the time of trial is in possession of vouchers which he could not produce to the auditor, or that he was prevented from exhibiting the claim to the auditor by absence from the state, sickness, or unavoidable accident."

Section 11013: "The auditor, whenever he may think it necessary in the settlement of any account or the drawing of any warrant, may examine the party, witnesses, and others on oath or affirmation touching any matter material to be known in the settlement of the account or the drawing of the warrant, and for that purpose he may issue summons and compel witnesses to attend before him and give testimony in the same manner and by the same means allowed in courts of record, and he shall reduce such evidence to writing, and file the same in his office."

These general statutory instructions to the auditor, coupled with the provision in the workmen's compensation act that warrants shall be issued only after the vouchers have been audited by the state auditor, can leave no doubt that the auditor has a discretion to exercise and that it is his duty to exercise such discretion and carefully examine and test all vouchers before issuing warrants thereon. This was fully recognized by the District Court in this case, as

after citing the statutes above enumerated, the court in its memorandum decision stated:

"On the part of the relator it is contended that under section 7705, Remington's Compiled Stats., *supra,* the duties of the Auditor concerning the issuing of a warrant are purely ministerial; that all discretion in the matter is exhausted when the Director as, under Section 7703, Remington's Comp. Stat., ascertained and established the amounts to be paid and issued a certificate for benefits accrued.

"The Court is constrained to give effect to each word of the statute, unless to do so would clearly tend to defeat or impair the legislative intent. The Court cannot say, in view of the language of Section 7705, but that it was intended the Auditor should exercise a supervisionary power and discretion concerning the acts of the Director, or it may have been intended that he, in his discretion, should consider matters supplemental to the Auditor's determination, as in case of death of a beneficiary after certificate or voucher issued. In either event, he is vested with a discretion in the matter."

The right of the state auditor to exercise discretion in the instant case is particularly apparent when some consideration is devoted to the nature of the voucher which the relator demands the auditor shall issue a warrant to cover. An examination of the record in the case of *Clifford v. Miller,* 288 Fed. 587, will show that the Department of Labor and Industries had a number of claims pending, the beneficiaries of which claims were alien enemies. Although these claims had been approved, vouchers had not been issued to cover, and it was well known by the officials of the Department of Labor and In-

dustries that on account of the conditions existing in Europe due to the war, many of the beneficiaries of such claims had died or remarried or were otherwise incompetent to receive the amount of such claims, and while no action had been taken to cancel such approved claims, it was not deemed advisable to prepare vouchers and submit same to the auditor for warrant.

Section 7679, Rem. Comp. Stat., provides in part as follows:

"* * * (1) If the workman leaves a widow or invalid widower, a monthly payment of thirty dollars ($30) shall be made throughout the life of the surviving spouse, to cease at the end of the month in which remarriage shall occur * * *."

The final exercise of discretion in this matter by the Department of Labor and Industries was rendered impossible by the decision in the case of *Clifford v. Miller, supra,* which directed the Department of Labor and Industries to prepare voucher on these claims and deliver such voucher to the Alien Property Custodian. One voucher was made in a lump sum covering all of these claims, and it is this voucher for which relator in error is now demanding warrant from the Auditor. This voucher covers all claims, the beneficiaries of which were alien enemies up to the time of the proclamation of peace. This action is the first demand on the auditor to issue a warrant on such claims, and is the first opportunity he has had to exercise his discretion in passing upon the validity of the voucher which is evidently based upon

claims, many of which are not now payable. In view, therefore, of the statutory discretion vested in the auditor and the peculiar conditions surrounding the issuance of the voucher in question, it was the duty of the auditor to examine such voucher and if, as a result of such examination, he was satisfied that the claim was not proper, to decline to issue a warrant therefor.

We have heretofore shown that this action is an action against the state of Washington, but irrespective of such fact, a writ of mandamus will not issue in any event to control discretion of an auditor in the issuing of a warrant.

"Such officers cannot be coerced as regards acts involving judgment or discretion. Thus when the officer has a discretion in the allowance or rejection of claims presented and exercises it, his determination cannot be controlled or reviewed on mandamus, though he may be required in the first instance to take initial action, as his determination as to whether the claim shall be allowed or rejected involves the judicial function. The writ will be denied if the performance of the act sought to be enforced is not clearly imposed upon the officer, as an official duty, or if the right to have the act performed is not clearly established, as where it is sought to compel the officer to draw a warrant in favor of the relator." 18 R. C. L. 192.

The application of the general rule that mandamus against state auditors will be denied when the issuance of warrants is discretionary, is fully borne out by the numerous cases cited in the note to the case of *Cook v. Iverson,* 52 L. R. A. (NS) 415, at

pp. 440, 441; also in the note to the case of *Ward v. Commissioners of Beaufort County,* 125 Am. Stat. Rep. 489, at p. 520.

In the case of *State ex rel. Davey v. Cheetham,* 20 Wash. 64, it was held that mandamus would not lie to compel the State Auditor to issue a warrant under an appropriation for the benefit of certain claims arising out of the construction of a normal school building to a person designated in the appropriation act where the Auditor was directed to examine and allow unpaid claims and he made such examination and disallowed the claim.

The federal court cannot by mandamus compel a state official to perform even a clearly ministerial act involving no exercise of discretion, unless the law makes it the duty of such official to perform such act. *King v. Davis,* 137 Fed. 222. The general rule that federal courts will not interfere by mandamus to control officers in the discharge of their duties where such acts involve the exercise of judgment or discretion has been repeatedly sustained by the supreme court of the United States, from the early case of *McIntire v. Wood,* 7 Cranch. 504, 3 L. Ed. 420. See 5 Fed. Stat. Ann. 2nd Ed. 947, for citations of numerous cases.

The general rule relative to the issuance of writs of mandamus by the federal district courts is stated

in Foster's Federal Practice, 6th Ed. p. 2261, as follows:

"Except when specifically authorized by statute a District Court of the United States has no power to issue a writ of mandamus which is not necessary for, or ancillary to, the exercise of its jurisdiction in another matter; even when the relief sought concerns a right secured by the Constitution of the United States."

Respondent in error demurred to relator in error's petition for writ of mandamus, and such demurrer was sustained by the district court. The respondent in error has not filed an answer to the writ and the question on the merits has never been considered by the court. Under the rules of practice of the district court in law actions, when a demurrer to a complaint is overruled, the party demurring shall have as of course ten days after service of written notice of the overruling of the demurrer in which to answer, and if this court should reverse the district court respondent in error should not be foreclosed from an opportunity to answer and have the issues heard on the merits.

Having shown that this action is an action against the state and therefore not within the jurisdiction of the district court, that it is not ancillary to the former suit of *Clifford v. Miller, supra;* that the state auditor has discretion in the issuance of warrants, and that the court will not by mandamus attempt to con-

trol such discretion, we respectfully submit that the decision of the district court should be affirmed.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

M. H. WIGHT,
Assistant Attorney General of the State of Washington,

Attorneys for Defendant and Respondent in Error.

H. C. BRODIE,
GUIE & HALVERSTADT,
Of Counsel.